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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

STATE OF MAINE, PETITIONER

VS.

RICHARD THORNTON, RESPONDENT

ON WRIT OF CERTIORARI TO THE  
SUPREME JUDICIAL COURT OF MAINE

BRIEF AND ARGUMENT OF AMICI CURIAE,  
STATE OF ALABAMA, JOINED BY ALASKA,  
AMERICAN SAMOA, ARIZONA, COLORADO,  
DELAWARE, KANSAS, KENTUCKY, NEBRASKA,  
UTAH, VERMONT, WEST VIRGINIA,  
WISCONSIN, AND WYOMING

CHARLES A. GRADDICK  
ATTORNEY GENERAL OF ALABAMA

AND

JOSEPH G. L. MARSTON III  
ASSISTANT ATTORNEY GENERAL

OFFICE OF THE ATTORNEY GENERAL  
250 Administrative Building  
64 North Union Street  
Montgomery, Alabama 36130  
(205) 834-5150

ATTORNEYS FOR AMICI CURIAE

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OFFICE OF THE ATTORNEY GENERAL  
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(205) 834-5150

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QUESTION PRESENTED

Does the Fourth Amendment extend to  
open fields which are fenced and posted  
with no trespassing signs?

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BRIEF AND ARGUMENT OF AMICI CURIAE,  
STATE OF ALABAMA, ET AL.

---

THE AMICI CURIAE

This brief and argument is submitted  
by the State of Alabama and joined by the  
following states and territories:

Alaska

Norman C. Gorsuch  
Attorney General

American Samoa

Aviata F. Fa'alevao  
Attorney General

Arizona

Robert K. Corbin  
Attorney General

Colorado	Duane Woodard Attorney General
Delaware	Charles M. Oberly, III Attorney General
Kansas	Robert T. Stephan Attorney General
Kentucky	Steven L. Beshear Attorney General
Nebraska	Paul L. Douglas Attorney General
Utah	David L. Wilkinson Attorney General
Vermont	John J. Easton, Jr. Attorney General
West Virginia	Chauncey H. Browning Attorney General
Wisconsin	Bronson C. La Follette Attorney General
Wyoming	Archie G. McClintock Attorney General



THE INTEREST OF THE AMICI CURIAE

Each of the listed states, by and through their attorneys general, respectfully offers this brief in support of the Petitioner, the State of Maine. The Amici will all be affected by the decision in this case, because, in addition to general law enforcement considerations, each of these states has laws, such as those relating to the protection of public health, wild game, timber and the environment and those against trespass, the effective enforcement of which depends on public

officers being able to enter open land regularly to check conditions.

#### CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States, which reads as follows:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

#### SUMMARY OF THE ARGUMENT

Since 1924 this Honorable Court has expressly treated open fields as being beyond the scope of the Fourth Amendment. Hester v. United States, 265 U.S. 57, 68 L. Ed. 898, 44 S. Ct. 445 (1924) The

issue in this case is whether Hester, above, was overruled by Katz v. United States, (389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 [1967])). Yet, the cases since Katz adhere to and may even have expanded Hester. E.g. Air Pollution Variance Board v. Western Alfalfa Corp. 416 U.S. 861, 40 L. Ed. 607, 94 S. Ct. 2114 (1974); United States v. Santana, 427 U.S. 38, 49 L. Ed. 2d 300, 96 S. Ct. 2406 (1976); G. M. Leasing Corp. v. United States, 429 U.S. 338, 50 L. Ed. 2d 530, 97 S. Ct. 619 (1977) This brief will address the effect on a wide public of an overruling of Hester.

I. Because of their closed nature, buildings are essentially private. The Fourth Amendment is designed to protect this privacy. Open land, even if it is privately owned and fenced, is not private. The elements, wild animals and

insects move about open land without regard for land lines or fences. Land is a natural resource and contains natural resources. While an owner has an interest in his land, the public has an equally undeniable interest in all open land. The public interest in open land was well established at the time the Fourth Amendment was drafted, and, for this reason, open land was excluded from the Amendment's shield. Compare Camera v. Municipal Court, (387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 [1967]) and See v. Seattle, (387 U.S. 541, 18 L. Ed. 2d 943, 87 S. Ct. 1737 [1967]) with Air Pollution Variance Board v. Western Alfalfa, above. The protection of vital public interests in land, soil, water, air, timber, wild life and public health requires that officials enter open land,

not because they have reason to believe that problems exist but to detect problems in time to minimize their impact. For these reasons, the Fourth Amendment should not be expanded beyond its language and traditional limits.

II. When a land owner fences and posts his property, he does so in an effort to envoke the protection of the trespass laws. For the trespass laws to give practical protection to land owners, they must be enforced by police officers' going onto the land to discover, arrest and remove trespassers. Yet, under the Maine Court's interpretation of the Fourth Amendment, the acts by which the law abiding land owner seeks to envoke the protection of the trespass laws would exclude from the land the officers charged with enforcing these laws. This is a boon to those who use

their land for unlawful purposes but a loss of valuable protection to law abiding land owners. This interpretation of the Fourth Amendment must be rejected.

#### ARGUMENT

In Hester v. United States, (265 U.S. 57, 68 L. Ed. 898, 44 S. Ct. 445 [1924]) this Honorable Court held that the Fourth Amendment did not apply to "open fields". Hester established the open fields doctrine which holds that real property which is beyond the curtilage of a home or business is beyond the scope of the Fourth Amendment. The issue in this case is whether Katz v. United States, (389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 [1967]) overruled Hester. It is interesting to note that if Katz did indeed overrule Hester no

one, apparently including the Honorable Justices who rendered Katz, seems to have noticed it until rather recently. In fact, this Honorable Court's decisions on the open fields doctrine since Katz seem to indicate an abandonment of the distinction between the curtilage and other open areas. See, for example, Air Pollution Variance Board v. Western Alfalfa Corp., (416 U.S. 861, 40 L. Ed. 2d 607, 94 S. Ct. 2114 [1974]),<sup>1</sup> United States v. Santana, (427 U.S. 38, 49 L. Ed. 2d 300, 96 S. Ct. 2406 [1976])<sup>2</sup>, G.M. Leasing Corp. v. United States, (429 U.S. 338, 50 L. Ed. 2d 530, 97 S. Ct. 619 [1977]).<sup>3</sup>

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<sup>1</sup>Plant premises outside of buildings. Hester relied on and cited at 416. U.S. 861, 865.

<sup>2</sup>The doorway of a home. Hester and Katz both cited at 427 U.S. 38, 42, 49 L. Ed. 2d 300, 305.

<sup>3</sup>Open areas. Hester cited at 429 U.S. 338, 352, 50 L. Ed. 2d 530, 543.

The instant case raises the question of whether government officials may enter land which is fenced and posted against trespassers without a search warrant or probable cause and exigent circumstances. In this brief the Amici states and territories will seek to present some of the "...effects on a wider public..."<sup>4</sup> of an overruling of Hester.

I.

THE EFFECT ON THE INTERESTS OF  
THE GENERAL PUBLIC IN OPEN  
LAND

The immediate effect of the interpretation placed on the Fourth Amendment by the Honorable Supreme

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<sup>4</sup>"...[C]haracteristic of adjudication is the tendency to concentrate on the immediate case at hand while paying less heed to the effects on a wider public...." "A Flawed System" by Derek C. Bok, Harvard Magazine, May-June, 1983, p. 38 at 42.



Judicial Court of Maine is to authorize owners of rural land to exclude from their land public officers, unless the officers have probable cause and either a warrant or exigent circumstances. This will naturally "balkanize" rural land as some owners indicate an expectation of privacy and others do not. Game wardens, foresters, environmentalists, and public health officials will be free to inspect this patch of land and that patch of land, but not the one in between, unless they have a warrant. This will make the protection of the public's interests in open land subject to the whim of individual owners.

There are fundamental differences between buildings and open areas, especially rural land. The purpose of a building is to enclose and exclude; the persons and property inside a building

are enclosed, while the elements, insects, wild animals and the public are excluded. What goes on inside a private building is primarily the concern of the owners or occupants and not the public. This is true of any building, whether it be a home, a business, a storage shed or a telephone booth.<sup>5</sup> If the public has a concern inside a private building, it may indeed enter the building to pursue the public interest. However, before the public enters a private building, our most fundamental public interests in personal freedom and human rights as embodied in the Fourth Amendment, require that the public have reason to believe that the building contains matters of public concern and, if possible, that the reason be presented to a neutral

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<sup>5</sup>E.g. Katz v. United States, 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507 (1967)

magistrate. Open land may be set off by a fence, but a fence cannot enclose nor exclude the elements, insects nor wild animals. As for the public, there are few people who have spent any time in rural areas who are not experienced in fence climbing. In addition, unlike a building, vehicle, container or other artifact, open land is a natural resource and usually contains other resources in the form of timber, game, fish, soil, water and minerals. While the owner unquestionably has an interest in his land, the public has an equally undeniable interest in the land and the timber, wildlife, water, soil and minerals found on the land. These are not new concepts, although recent population increases and resource depletions have made them more pressing.

These concepts were already ancient when the Fourth Amendment was drafted, which explains why open land was excluded from the Amendment's shield. Compare Camera v. Municipal Court, (387 U.S. 523, 18 L. Ed. 2d 930, 87 S. Ct. 1727 [1967]), forbidding warrantless searches of private residences by a building inspector and See v. Seattle, (387 U.S. 541, 18 L. Ed. 2d 943, 87 S. Ct. 1737 [1967]), reaching the same conclusion with regard to a commercial warehouse, with Air Pollution Variance Board v. Western Alfalfa Corp., (416 U.S. 861, 40 L. Ed. 2d 607, 94 S. Ct. 2114 [1974]) upholding a warrantless entry onto business premises outside of buildings by an air pollution inspector.

The problem with applying the Fourth Amendment to open land is not the warrant requirement but the probable cause

requirement. Officials who are charged with protecting wildlife, the environment and public health, seldom enter a particular portion of land because they suspect that there is a problem. Usually, by the time a problem becomes noticable to any but a well trained observer, it is extremely serious. Game wardens must act before a species becomes endangered. The condition of the soil, water and air must be monitered before fish, birds and people start dying or farm land is stripped of its top soil. These public interests can only be protected by random spot checks of open land by trained experts. By the time dangerous conditions on posted land become detectable on unposted land, disaster may be unavoidable. An insect

infestation which could have been controlled by the destruction of a single tree, can infect millions of acres of timber land within a few months. Having asserted his expectation of privacy, a land owner could tip the balance toward the extinction of a species long before conservation officers had any articulatable reason to believe that illegal hunting, fishing, or trapping was in progress. A few rabid squirrels on posted land could produce an epidemic by the time diseased animals were noticed on non-posted land.

These concerns for the world's land, soil, trees and wild life transcend not only land lines but international boundaries as well. See, for example, Missouri v. Holland, 252 U.S. 416, 64 L. Ed. 641, 40 S. Ct. 382 (1920) The Fourth Amendment protects private interests in

places which are capable of being private. Open land, even if owed privately, is not private. It is open to the world, and the public interests in it are at least as great as those of the owner. Open land is occupied by wild animals which are "owned"<sup>6</sup> by the public, and covered with trees, crossed by water and air, and contains soil and minerals in which the public has vital interests. For all of these reasons, the Fourth Amendment ought not be expanded beyond its language and traditional limits.

## II.

### THE EFFECT ON LAW ABIDING LAND OWNERS.

The Fourth Amendment Exclusionary Rule has often been criticized for the protection it gives to criminals. The

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<sup>6</sup>35 Am Jur. 2d, Fish and Game, Section 1.

response to this criticism is that, while the rule may protect criminals, it also protects the innocent. However, in the instant case, the Maine Court seems to have succeeded in creating a rule which not only protects those who engage in unlawful activities on their land but which at the same time strips law abiding land owners of the protection of the trespass laws.

A land owner who fences his property and erects "no trespass" signs does so in an effort to evoke his rights under the trespass laws. The problem is that fences can be climbed and signs disregarded, and the persons most likely to do these things will be, by and large, the very people the land owner would most like to exclude. For protection against these persons the land owner must count



on the police to arrest or at least remove trespassers from his land. But, how is an officer going to discover trespassers without entering the land from time to time? However, under the interpretation of the Fourth Amendment embraced by the Honorable Supreme Judicial Court of Maine, an officer could not do this, if the land were fenced and posted against trespassers. In other words, the honest land owner's fencing and posting his land in an effort to protect himself from trespassers would prevent officers from going onto the land to enforce the trespass laws. A rule such as this is a great boon to marijuana growers, illegal waste dumpers and others who use open land for unlawful purposes, but it will greatly reduce the protection now afforded to law-abiding citizens.

The Fourth Amendment may sometimes protect the lawless but it was never the Amendment's purpose to aggrandize the interests of the lawless over those of the law abiding. If this result is to be avoided, the interpretation placed on the Fourth Amendment by the Honorable Supreme Judicial Court of Maine must be rejected.

#### CONCLUSION

In conclusion the Amici respectfully submit that extending the Fourth Amendment beyond its traditional limits to open fields would severely limit the ability of the states, territories and the federal government to protect vital public interests in open land and to enforce the trespass laws for the benefit of law abiding land owners. Therefore,

the Amici respectfully urge this Honorable Court to uphold the Fourth Amendment in accordance with its plain words, as protecting, "The right of the people to be secure in their persons, houses, papers, and effects..." but not extending to open fields.

Respectfully submitted,

151  
CHARLES A. GRADDICK  
ATTORNEY GENERAL OF ALABAMA

151  
JOSEPH G. L. MARSTON III  
ASSISTANT ATTORNEY GENERAL OF  
ALABAMA

ATTORNEYS FOR AMICI CURIAE

ADDRESS OF COUNSEL:

Office of the Attorney General  
250 Administrative Building  
64 North Union Street  
Montgomery, Alabama 36130  
(205) 834-5150

CERTIFICATE OF SERVICE

I, Joseph G. L. Marston III, an Assistant Attorney General of Alabama, a member of the Bar of the Supreme Court of the United States and one of the Attorneys for the State of Alabama and the other Amici Curiae States and territories, do hereby certify that on this 16<sup>th</sup> day of May, 1983, I did serve the requisite number of copies of the foregoing on the Attorneys for the State of Maine, Petitioner, and Richard Thornton, Respondent, by mailing same to them, first class postage prepaid and addressed as follows:

Honorable James E. Tierney  
Attorney General  
State of Maine  
Office of the Attorney General  
State House Station 6  
Augusta, Maine 04333

Honorable Wayne S. Moss  
Assistant Attorney General  
State of Maine  
Office of the Attorney General  
Criminal Division  
State House Station 6  
Augusta, Maine 04333

Honorable Donna L. Zeegers  
Attorney at Law  
P. O. Box 2709  
1 Community Drive  
Augusta, Maine 04330

15/  
JOSEPH G. L. MARSTON III  
ASSISTANT ATTORNEY GENERAL

ADDRESS OF COUNSEL:

Office of the Attorney General  
250 Administrative Building  
64 North Union Street  
Montgomery, Alabama 36130  
(205) 834-5150